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IN THE

Supreme Court of the United States

October Term, 1978

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS.

BRIEF OF RESPONDENT.

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ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS.

BRIEF FOR RESPONDENT.

Procedural History.

On July 15, 1976, Lo-Ji Sales Inc., (hereinafter petitioner), was charged by Investigator J. A. Hurbanek of the New York State Police with committing on June 25, 1976, three (3) counts of the crime of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 books possessed in the front room of petitioner's store. The subject of the second count was approximately 474 reels of movie film possessed in the counter area of the

front room of petitioner's store. The subject of the third count was 26 movie projectors with films possessed in the front and rear rooms of the petitioner's store.

By Notice of Motion dated July 29, 1976, petitioner, through trial counsel, Kassner and Detsky, P.C., moved to suppress the evidence which made up the subject matters of all three counts of Obscenity. In a Memorandum of Law dated August 2, 1978, the People of the State of New York, (hereinafter respondents), consented to the holding of a hearing to determine the factual issues raised by the petitioner's motion. With the consent of both parties, this hearing was scheduled to be heard before Judge O'Connor on August 27, 1976, at 2:00 p.m. By Notice of Motion dated August 24, 1976, petitioner asked Judge O'Connor to disqualify himself on the grounds that petitioner intended to call the Judge as a witness. On August 27, 1976, at 2:00 p.m., Judge O'Connor disqualified himself and in his place Judge Giza continued the hearing. On November 22, 1976, Judge Giza denied petitioner's motion to suppress on all three (3) counts.

On February 3, 1977, petitioner, through trial counsel, pleaded guilty to all three (3) counts of Obscenity in the Second Degree. Petitioner was fined $1,000 on each count, for a total of $3,000. Recently, petitioner paid its fine in full.

The remainder of the procedural history is adequately set forth in petitioner's brief.

Facts.

On June 20, 1976, Investigator Hurbanek entered petitioner's store in Wawayanda, Orange County, New York, and purchased from Mr. Alex Mandakis, the clerk of petitioner's store, two (2) films entitled *Linda and Duke*

and *Four For Dinner*.[1] (TR-22)[2] At this time the Investigator observed other reels of film and magazines beting displayed to the public (A-6).[3] While in the store the Investigator had conversations with Mr. Mandakis (A-6, A-7). Based upon these conversations and his observations, he learned that the other films and magazines portrayed or depicted similar activities as were in the films which he purchased (A-6, A-7). After purchasing these two films, Investigator Hurbanek viewed both of them (A-6). He observed that the film entitled *Linda and Duke* contained acts of female masturbation and beastality involving a dog and a female (A-6). He observed that the film entitled *Four For Dinner* contained acts of sexual intercourse, sodomy, fellation, cunnilingus and masturbation (A-6).

Thereafter, Investigator Hurbanek asked Judge O'Connor, Town Justice, Town of Wawayanda, Orange County, New York, to come to the Orange County District Attorney's Office, Goshen, New York, to view these films so that Judge O'Connor could independently determine whether or not there was reasonable cause to believe that these two (2) films were obscene[4] (TR-3, 4, 5, 6).

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[1]Mr. Mandakis was charged with violating the New York State Penal Law for selling Investigator Hurbanek these two films. He pled guilty to the violation of Disorderly Conduct and was sentenced to a conditional discharge at the same time the petitioner pled guilty to the three counts of Obscenity in the Second Degree. Mr. Mandakis never appealed his conviction of Disorderly Conduct.

[2]TR refers to Trial Record page numbers.

[3]A refers to Appendix page numbers.

[4]Throughout this brief, respondent will use the word obscene as a legal shorthand meaning the definition of the word as found in the New York State Penal Law Section 235.00, Subdivision 1.

On June 25, 1976, at approximately 9:00 a.m., Judge O'Connor viewed both films in their entirety at the Orange County District Attorney's Office (TR 5, 84, 105). Thereafter, Investigator Hurbanek asked Judge O'Connor to accompany him to petitioner's store so that the Judge could independently determine whether or not there was reasonable cause to believe that the material being offered to the public for sale was obscene (TR 7, 84).

At approximately 10:30 a.m. in the Town of Wawayanda, Investigator Hurbanek signed the affidavit in support of the search warrant in the case at bar, and Judge O'Connor then issued and signed the search warrant (TR 7, 86, 93). Petitioner in his brief of pages 6 and 7 shows how the search warrant appeared at the time that Judge O'Connor signed it. At the same time that the Judge signed the search warrant, he also signed a warrant for the arrest of Mr. Mandakis for selling Investigator Hurbanek the two (2) above-entitled films on June 20, 1976 (TR 6, 7). At approximately 11:13 a.m., Judge O'Connor, Investigator Hurbanek and three (3) other investigators and three (3) uniformed members of the New York State Police entered petitioner's store (TR 11, 69, 70). Investigator Hurbanek told Mr. Mandakis that he had a warrant for Mr. Mandakis' arrest, and that Judge O'Connor was there to view materials being sold to the public to determine whether or not there was reasonable cause to believe that any of these materials were obscene (TR 12). Investigator Hurbanek also advised Mr. Mandakis of all his constitutional rights, and showed Mr. Mandakis a copy of the search warrant (TR 10, 11, 12). Investigator Hurbanek told Mr. Mandakis that the Judge desired to view movies being shown to the public in booths in the main room of the store (TR 13). Investigator Hurbanek asked Mr. Mandakis if he had change for the Judge to view all the films in each booth, and Mr. Mandakis volunteered to turn the projectors on automatically in order to expedite the search (TR 13). Mr. Mandakis then voluntarily went to the back section of one of the booths and adjusted the wires so that the Judge could view the film being shown in each booth without using any money (TR 14). The Judge then viewed 23 of 24 films being shown to the public in coin-operated machines in the front of petitioner's store[5] (TR 14, 15). These films did not have any sound (A 17, 18, 19). The Judge viewed between two (2) and three (3) minutes of each eight (8) millimeter film until he was satisfied that there was reasonable cause to believe that each film was obscene (TR 97). While viewing the films, the Judge dictated to Investigator Hurbanek what he saw (TR 14, 15). Upon being satisfied that there was reasonable cause to believe that the film was obscene, he orally directed that the police seize the films and projectors (TR 15).

The Judge next went to the rear rooms of the store which contained four (4) coin-operated machines exhibiting films to the public[6] (TR 16). Some of these films had sound (TR 16). Again, Mr. Mandakis voluntarily automated each booth so that the Judge could view the film without using money (TR 17). The Judge then viewed between two (2) and five (5) minutes of each of four (4) eight (8) millimeter films, and dictated to Investigator Hurbanek what he saw (TR 17, 98). After the Judge determined that there was reasonable cause to believe that the film in the projector was obscene, he orally directed the police to seize the projectors with the films (TR 17).

These 26 films and projectors made up the third count of the information charging the petitioner with the crime of Obscenity in the Second Degree.

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[5]Respondent timed a random sample of these films and determined that each of the films was less than ten (10) minutes.

[6]Respondent viewed the film cartridges and saw that the cartridge claimed to contain fifteen (15) minutes of film.

After viewing the films being shown to the public in the rear room, the Judge returned to the front room of the store where books and magazines were being displayed to the public on three (3) walls and three (3) tables (TR 18, 20). Some of the magazines had clear plastic or cellophane wrapping entirely around them (TR 19). Since the Judge only has one arm, he asked two police officers to take the covers off the magazines (TR 19). The Judge then proceeded to look through the magazines on the three (3) walls and three (3) tables in the front room (TR 20). He spent no less than ten (10) to fifteen (15) seconds nor more than one (1) minute looking through any magazine (TR 38, 39). The only magazines that he directed the police to seize were those magazines comprised mainly of pictures with captions, so that he could view the magazine by just looking at the pictures and reading captions (TR 76, 128, 129). He did not review any magazine or book that had substantial amounts of written material or stories (TR 76). Accordingly, any magazine with substantial amounts of written material was not seized (TR 24, 76). If after looking at the pictures in the magazine and reading the captions, the Judge was satisfied that there was reasonable cause that the magazine was obscene, he directed the police to take each and every copy of the magazine being displayed to the public (TR 22). In all, the Judge directed the police to take approximately 400 magazines, which comprised the first count of the information charging the defendant with Obscenity in the Second Degree.[7]

[7]From the inventory return filed in the case the total number of magazines taken was 397; and these 397 magazines consisted of 268 different publications. The breakdown of the 397 magazines was as follows: 1 copy of 202; 2 copies of 37; 3 copies of 14; 4 copies of 4; 5 copies of 4; 6 copies of 3; 9 copies of 1; and 15 copies of 1.

After reviewing the magazines, the Judge proceeded to a counter in the front of the store which contained films in boxes (TR 26). These films were being exhibited to the public and were for public sale (TR 26). On the outside of each box there was a still picture (TR 26). Some boxes also had a brief description of the film.[8] Investigator Hurbanek and the Judge told Mr. Mandakis that they were going to open the individual boxes to look at the film (TR 26). Mr. Mandakis told the Judge that it was not necessary to open the boxes to see what the film inside contained because the photo on the outside of the box showed what the movie in the box was all about (TR 26). Mr. Mandakis further told the police that all the boxes contained "sex films" (TR 26). After hearing this information, Judge O'Connor only looked at the picture on the outside of each box (TR 26). If he was satisfied from the picture and Mr. Mandakis' admission that there was reasonable cause to believe that the film in the box was obscene, he directed the police to seize each box containing that film (TR 26). The police seized approximately 474 eight (8) millimeter films in boxes from this area of the store. This made up the second count of the information.[9]

While Judge O'Connor reviewed the magazines and films, Investigator Hurbanek took down the title of each film or magazine that the Judge directed be seized (TR 90).

[8]Respondent learned this information from looking at the items.

[9]From the inventory return filed in the case the total number of reels of film taken was 431; and these 431 reels of film consisted of 351 different movies. The break down of the 431 reels of film is as follows: 1 copy of 288; 2 copies of 53; 3 copies of 5; 4 copies of 4; and 6 copies of 1.

After looking at the boxes by the front counter, the Judge observed mannequins on display with "frilly" clothing and "rubber" products being offered for sale to the public in the front room of petitioner's store (TR 27, 153). If the Judge felt that there was reasonable cause to believe that this product was legally obscene, he directed the police to seize it (TR 27). Petitioner was not specifically charged with any crime for possessing any rubber material or mannequins.

The Judge left petitioner's store at approximately 5:00 p.m. (TR 28). The police took all the items which were seized at the Judge's direction to New York State Police Barracks in Middletown, New York (TR 70, 71, 72). Between 5:30 p.m. and 11:00 p.m. members of the New York State Police, with the assistance of stenographers from the Orange County District Attorney's Office, listed on the search warrant and on the inventory all the items that the Judge had orally directed to the police to seize (TR 46, 47). Investigator Hurbanek then brought the completed search warrant to the Judge that evening (TR 84).

During the entire period that the Judge and the State Police officers were in the petitioner's store, the store was open to the public (TR 28). Customers were free to enter the store throughout the day, but at the request of Mr. Mandakis would not have been allowed to view the movies when the machines had been automated (TR 50, 51, 74). The only reason the police were taking names of people who came to the store was to have a list of potential witnesses (TR 74, 75, 77). Mr. Mandakis was permitted to move freely throughout the store during the entire day but would not have been allowed to exit from the store if he wished to do so (TR 29, 31, 51, 52, 120, 134, 135).

On June 26, 1976, the day after the Judge and the State Police were in the store, petitioner's store was again open for public business (TR 28, 29).

ARGUMENT.

POINT I.

The search for and seizure of items other than the two films identified in the warrant at the time of its issuance was constitutionally proper because under the Fourth Amendment petitioner had no reasonable expectation of privacy against governmental intrusion concerning these items since all the items were being displayed to the general public in areas of petitioner's store open to the general public.

At the outset it must be emphasized that this case only involves alleged violations of the Fourth Amendment. By its plea of guilty, petitioner admitted that all items seized which formed the subject of the three (3) separate charges, were in fact obscene.

In Points I and II petitioner argues that the search and seizure in the case at bar violated the Fourth Amendmen for three (3) reasons. First, the search and seizure was conducted without a warrant. Second, if the Court were to determine that the search and seizure was conducted with a warrant; then there was no probable cause to search established in the affidavit in support of the warrant. Third, if the search and seizure was conducted with a warrant, then the warrant was in fact a general warrant. Since respondent submits that these three (3) reasons are wrong because the Fourth Amendment only protects reasonable expectations of privacy, respondent will answer all three (3) reasons in one point.

In prior cases this Court has stated the history and purpose of the Fourth Amendment, *Boyd v. United States,* 116 U. S. 616, 625, 630 (1886); *Marcus v. Search Warrant,* 367 U. S. 717, 724-729 (1961). In *Boyd v. United States, supra,* on page 630, Mr. Justice Bradley declared:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

As recently as last term, this Court reaffirmed that the Fourth Amendment only protected people's legitimate and reasonable expectations of privacy from governmental intrusions, *Rakas v. Illinois,* U. S. (1978); 58 L. Ed. 2d 387.

> *Katz v. United States,* 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), provides guidance in defining the scope of the interest protected by the Fourth Amendment. In the course of repudiating the doctrine derived from *Olmstead v. United States,* 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928), and *Goldman v. United States,* 316 US 129, 86 L Ed 1322, 62 S Ct 993 (1942), that if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. 889 US, at 353, 19 L Ed 2d

> 576, 88 S Ct 507; see *United States v. Chadwick,* 433 US 1, 7, 53 L Ed 2d 538, 97 S Ct 2476 (1977); *United States v. White,* 401 US 745, 752, 28 L Ed 2d 453, 91 S Ct 1122 (1971). *Rakas v. Illinois, supra,* 401.

"(T)he Warrant Clause (of the Fourth Amendment) makes a significant contribution to the protection," *United States v. Chadwick, supra,* 7. Mr. Justice Stewart summarized the importance and purpose of the Warrant Clause, *Chimel v. California,* 395 U.S. 752, 761-762 (1969):

> As the Court put it in *McDonald v. United States,* 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153: "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed to precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. • • • And so the Constitution requires a magistrate to pass on the desire of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *Id.,* at 455-456, 69 C. Ct., at 193.

Thus it can be seen that one of the underlying purposes of the Fourth Amendment is to place a neutral and detached magistrate between our citizen's reasonable expectations of privacy and members of law enforcement

entrusted with the "competitive job of ferreting out crime", in order to insure that law enforcement officers do not illegally invade a person's private domain. It follows that if a person has no reasonable expectation of privacy about certain items in certain areas, then the Fourth Amendment does not protect him from law enforcement's search of that area for those items. *Rakas v. Illinois, supra; Katz v. United States, supra.*

Thus, even if this Court were to accept petitioner's triple argument that the warrant in the case at bar was no warrant at all, or that it was a general warrant at the time of its issuance, or that it was not based upon probable cause to search the store (and respondent is not conceding any of this by merely restating petitioner's argument); if petitioner had no reasonable expectation of privacy from governmental intrusions into the area of his store in which the search was conducted for the films and magazines, then the Judge's initial viewing of the films and magazines was constitutionally proper, *Rakas v. Illinois, supra.* In the case at bar, respondent respectfully submits that petitioner has no reasonable expectation of privacy as to any of the items searched for because petitioner was exhibiting all these items to the general public. The parts of the store where the Judge viewed the films and magazines in question were open to any member of the general public. Rather than expecting these items to remain private, it was petitioner's purpose, desire, hope and expectation that members of the general public would look throughout the front and back room of his store at the items being displayed there and then purchase or view the same.

The fact that petitioner may or may not have expected a Town Justice to enter his store to view the items being displayed to the general public is totally irrelevant:

> *Hoffa v. United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966) which was left undisturbed by Katz, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States,* at 302, 87 S. Ct., at 413. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis v. United States,* 385 U.S. 206, 87 C. Ct. 424, 17 L. Ed. 2d 312 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. *Lopez v. United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963). *United States v. White, supra,* 749.

Under *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Lee Art Theater, Inc., v. Virgnia,* 392 U.S. 636 (1968); *Marcus v. Search Warrant, supra,* a law enforcement official may not decide for himself whether or not there is probable cause to believe an item is obscene. However, these cases do not hold that a law enforcement official may not enter a store, which is open to the public or go into a movie upon paying the admission price, and look at what is being displayed to the general public.

If a law enforcement official may do this, then it follows *a fortiori* that a neutral and detached magistrate may also enter a store or theater.

In the case at bar, the Justice of the Peace entered the store during business hours when it was open to the general public, and contrary to petitioner's allegations, only viewed items being displayed to the general public in areas open to the general public. Upon entering the store, Mr. Mandakis was informed that the police had a warrant for his arrest and that the Judge was there to view items being displayed to the public to determine whether or not any of these items were obscene. Mr. Mandakis was permitted to move freely throughout the store during the entire day. The store was never closed to the public and Mr. Mandakis, who realized this fact, told Investigator Hurbanek and the Judge, when he voluntarily activated the movie machines that he didn't want customers who might enter the store to get a free view of the movies. The police officers who were stationed at the front door and were assigned to take the name of any person entering the store, were not taking these names in order to harass these people, or to close the store. In the case at bar, the state police officer assigned to the door had a legitimate reason to learn the name of every person entering the store while the Judge was viewing items, because this person was a potential witness at a suppression hearing. Certainly the police must be expected and permitted to record the names of potential witnesses.

Petitioner wrongly characterizes the role of Judge O'Connor as an agent of the police. While it is true that both the Judge and members of the New York State Police are paid by the State of New York that fact does not make the Judge an agent of the police. If it did,

then all our state legislatures and state judges would be agents of the state police. As stated above, the purpose of the Warrant Clause of the Fourth Amendment is to place a neutral and detached magistrate between our citizency and members of law enforcement, and to thereby limit *law enforcement's* right to rummage through people's belongings, *Chimel v. California, supra.* Whenever any judge reviews a warrant and affidavit in support thereof and then issues a warrant he is assisting law enforcement in one sense. Without his authorization they can't gather evidence but with it they can, *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). However, the mere fact that the Judge assists law enforcement in this manner does not make him an agent of law enforcement. Our Constitution not only envisioned this type of assistance and interaction, but also the Warrant Clause of the Fourth Amendment expressly authorized it. The fact that the Judge went to the store and viewed many items does not change his role as Judge. Rather, it is a result of the more stringent requirements of our Constitution when the search and seizure concerns expressive material, *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky, supra; Marcus v. Search Warrant, supra.*

In the state courts petitioner never showed by any evidence that Judge O'Connor was not neutral and detached. The facts adduced at the hearing demonstrate beyond any question that Judge O'Connor acted in a neutral and detached manner in reviewing the items. He reviewed every item on his own, and he only directed the police to seize some of the items that he had reviewed.

This is not a case where the police conducted a search and seizure without a warrant or with a general warrant. The vice of a warrantless search and seizure or one conducted under a general warrant is that *members of law*

enforcement search wherever they want and seize whatever they want. The whole purpose of a warrant is that it limits where *the police* may search and what they may seize. In the case at bar, the search was limited to areas open to the general public. In the case at bar, law enforcement's power to seize was completely and totally limited by the Judge's oral instructions.

While normally the instructions limiting what may be seized and the underlying facts stating probable cause for the search and seizure are recorded in the warrant before members of law enforcement enter the area to be searched, both New York and Federal Law now permit oral applications in support of search warrants, Federal Rules of Criminal Procedure 41 (c) (2); *People v. Brown,* 40 N.Y. 2d 183 (1976). Similarly, respondent submits that where law enforcement may not review the items on their own to determine probable cause, and where the items may quickly disappear, the exigency of the circumstances compel the conclusion that there is no legal or logical reason why the instruction on what to seize may not be oral, when the Judge is at the scene as long as what is seized is recorded.

Part of petitioner's argument is that the Judge lacked probable cause to search for and seize the items which petitioner displayed to the public at the time of issuance of the warrant. From this premise petitioner argues that if the Judge lacked probable cause to search at the time of issuance, then he also lacked probable cause to seize.

The underlying fallacy in petitioner's argument is that he assumes that the search and seizure are contemporaneous and identical and thus based upon the same probable cause. However, in many Fourth Amendment

controversies the probable cause to search is not identical to the probable cause to seize. In many Fourth Amendment controversies the, probable cause to search proceeds, and is independent from the probable cause to seize. It is entirely possible for there to be no probable cause to seize at the time of the search or viewing, but for the probable cause to seize to develop during the search or viewing and thus be present at the time of the actual seizure. The plain view exception to the warrant requirement is one example of this situation, *Coolidge v. New Hampshire, supra,* 465. A police officer who is lawfully in an area, whether by warrant or invitation or otherwise, may seize an item upon *inadvertantly* seeing it if it is in plain view. This means that when the officer went to the area, he had no probable cause to seize the item or to believe that it was there, otherwise he would have had to obtain a warrant, *Coolidge v. New Hampshire, supra;* but upon seeing the item the officer realizes its significance and thus has probable cause, to seize it at the time that it is taken. Further, in some Fourth Amendment controversies probable cause to search is never an issue only probable cause to seize is, *Heller v. New York, supra.*

By keeping in mind that the search and the seizure of items are separate and distinct steps and in analyzing the case at bar in this way, it will be seen that there was no constitutional violation. The search consisted of the Judge's entry into the area of petitioner's store that was open to the general public and his viewing material being openly displayed to the general public in this area. It is respectfully submitted that the Fourth Amendment does not require probable cause to look at items being displayed to the general public in areas open to the general public because the owner of such items has no reasonable expectation of privacy as to those items, *Rakas v. Illinois, supra; Katz v. United States, supra.* In *Heller v. New*

York, supra, the Judge lawfully entered the theater and viewed the movie being displayed to the public. In *Heller v. New York, supra,* there was no claim that the Judge could not view or search for the movie at the time that he entered the theater even tho he had no probable cause at that time to believe that the movie being shown was obscene. The seizure in the case at bar occurred after the Judge had viewed the items and directed that certain of these items be seized. Similarly, the seizure in *Heller v. New York, supra,* occurred after the Judge viewed the films. In this case the Judge had signed a warrant prior to entering, while in *Heller* he did not. However, the fact that a Judge had a warrant prior to entry should not change the applicable principles. If it did, it would mean that the Judge could have entered the public areas of the store to look at what was being displayed to the public without a warrant, but by having a warrant his right to enter this area and view this material was for some reason extinguished. Certainly, the State should not be penalized by acting in good faith to protect citizen's rights and securing a warrant prior to entry. The basic scope of the Fourth Amendment is to protect citizens' legitimate reasonable expectations of privacy from governmental intrusion. If the citizen has no legitimate reasonable expectation of privacy about an item because he displays it to the general public in a public area, it makes no difference if the government agent enters and looks at this item with or without a warrant.

The cases cited by petitioner, *Heller v. New York, supra; Marcus v. Search Warrant, supra; Lee Art Theater, Inc., v. Virginia, supra,* all concern the issue of probable cause to seize. They in no way change or limit the right of a Judge or law enforcement to legally view (search) what is displayed to the public or in public areas. The protection afforded to those people who display expressive material to the public areas by the Fourth Amendment is that the Judge must first review the material before it is taken from the person.

POINT II.

The Judge's initial examination of the items in petitioner's store was not insufficient as a matter of law upon which to order the seizure of these items temporarily as evidence, especially since petitioner was given the right to an immediate adversary hearing on the issue of the obscenity of any items ordered seized.

While petitioner's first and second points addressed the underlying validity of the entire search, petitioner's third point must be analyzed in relation to each of the three separate charges upon which petitioner was convicted by his plea of guilty. If the Court agrees with petitioner's contention that the search is illegal for the reasons set forth in his first or second point, then the entire seizure must be suppressed, *Mapp v. Ohio,* 367 U. S. 643 (1961). However, since petitioner was convicted of three (3) separate offenses, based upon three (3) different types of initial examinations of the items comprising the three (3) separate offenses, it is possible for the Court to logically determine that the Judge's initial examination of probable cause of obscenity as to the items comprising one or more charges was sufficient, while his initial examination as to other items may not have been. For this reason respondent will analyze the initial examination of the items comprising each offense separately, rather than lumping all the items together as petitioner has done.

This aspect of this case presents a novel issue. Two competing interests are in conflict. On one hand, there is the concept of "constitutional protection for free expression," *Marcus v. Search Warrant, supra,* 730. On the other hand, there is the accepted "postulate that the primary requirements of decency may be enforced against

obscene publications," *Kingsley Books v. Brown,* 354 U. S. 436, 440 (1957). The difficulty in resolving this problem is that a balance must be struck between these two competing, recognized interests.

Certain principles have been developed which can help resolve the issue. The standard to be applied in making a final adjudication of obscenity to convict criminally, or to enjoin permanently was announced by this Court in *Miller v. California,* 413 U. S. 15 (1973) and is quoted by petitioner in his brief. Second, this Court held that a Judge, not a police officer may make the initial determination of probable cause to seize an item temporarily, as evidence, *ex parte,* and the Judge may not make this initial determination based upon conclusionary allegations of police officers,[5] *Heller v. New York, supra; Marcus v. Search Warrant, supra; Lee Art Theater, Inc., v. Virginia, supra; Roaden v. Kentucky, supra.* Third, in *Kingsley Books v. Brown, supra,* this Court held that a state may temporarily enjoin a person from distributing expressive material if the person is granted the right to a prompt, full adversary hearing on the issue of whether or not the item is legally obscene.

[5]Left open is the question whether or not a Judge may make the initial determination of probable cause to seize based upon sufficient factual allegations of the police officer without ever seeing any of the items himself. At least one lower court has answered the question in the affirmative, *United States v. Pryba,* 502 F 2d 391 (C.A.D.C., 1974).

Thus, in order to strike a balance between a citizen's right to free expression and the public's right to enforce its requirements of decency against obscene items, a judge must "focus searchingly" on the issue whether there is probable cause to believe an item is obscene prior to any seizure of the item as evidence, *Heller v. New York, supra.* The term probable cause means "less evidence than would justify condemnation," *United States v. Ventresca,* 380 U. S. 102, 107 (1965). A Judge's "determination of probable cause should be paid great deference by reviewing courts," *Spinelli v. United States,* 393 U. S. 410, 419 (1969), *Jones v. United States,* 362 U. S. 257, 270, 271 (1960).[6]

While the Judge must "focus searchingly" on the issue of obscenity in making this initial determination, the extent or length of the initial restraint until the party may

[6]Counsel for petitioner urges that Judge O'Connor's determination is not only unworthy of a deference, but also of any weight whatsoever, because he is a layman, and because he couldn't recite the definition of obscenity under *Miller v. California, supra,* and the New York Penal Law. Probably, very few lawyers in this country could recite the definition from memory. However, as petitioner concedes, Judge O'Connor had a copy of the law with him during the search. Also, defining the word "obscene" has been a problem, even for this Court. *Miller v. California, supra,* details that problem. As Mr. Justice Stewart once said in commenting upon a definition of obscenity—

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alyberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it (footnotes omitted). *Jacobellis v. Ohio,* 378 U. S. 184, 197 (1964).

It is respectfully submitted that a layman, also could know it when he sees it.

fully litigate the issue of obscenity, also appears to be a factor to consider in assessing how much of the item the Judge must initially examine, *Kingsley Books v. Brown, supra; United States v. Sherwin,* 539 F. 2d 1 (9th Cir. 1976).

For example, it is submitted that a different standard or "focusing searchingly" should be required if hundreds or thousands of people are going to be prevented from seeing a full length film by its seizure for two to three weeks, than if only one or two, or perhaps nobody, is going to be prevented from viewing or buying a magazine by its seizure for only one or two days.

Also, common sense tells us that different types of materials lend themselves to different types of review. *United States v. Tupler,* 564 F. 2d 1294, 1298 (9th Cir., 1977, Judge Sneed, concurring). It is much quicker to review a short eight (8) millimeter film without sound which only displays one sexual act after another, or a magazine which only has pictures that show one sexual act after another or prominently display the genital area, than to review a 200 page erotic novel or a full length sound motion picture, *United States v. Tupler, supra,* Judge Sneed, concurring.

Common sense tells us that a Judge may consider the market or location where the items is being sold. *United States v. Tupler, supra,* Judge Sneed, concurring. If a Judge is in an adult store which exclusively promotes sexually explicit materials, and the store has numerous short films, once he has looked at some of the films, he could tell quickly whether or not other films were of the same genre as the ones he just saw. In that same type of store, once he looked through some picture magazines, he could tell quickly whether or not other picture magazines were of the same genre as the one he just saw.

On the other hand, if the Judge was at a large book store such as Barnes and Noble, which has a wide and diverse stock of materials, by looking at some items he wouldn't necessarily know what other items in the store would be like.

In the case at bar, one charge of Obscenity in the Second Degree was based upon petitioner's showing of 26 movies in machines in his store. These movies were all short length eight (8) millimeter films. The Judge viewed between two to three minutes of each of the 23 films without sound displayed to the public in the front room and between two and five minutes of the four films some with sound being displayed to the public in the rear room. Respondent submits that it cannot be said as a matter of law that the Judge did not view enough of these films in order to form a sufficient basis to determine whether or not there was cause to probably believe the film was obscene, especially where petitioner had the right to a full adversary hearing on the issue of obscenity immediately, or as soon as practicable after the seizure, *United States v. Pryba, supra.*[7]

The second charge of Obscenity in the Second Degree concerns 400 magazines. After viewing the 27 films in machines, the Judge looked at magazines being displayed to the public. While the Judge spent less than a minute on any magazine, it must be emphasized that the only magazines ordered seized were those consisting predominantly of pictures with captions. Any magazine with any significant amount of written material was not seized because the Judge did not review the written material. Again, respondent submits that it cannot be said as a matter of law that the Judge did not view enough of

[7]Although given this right to an adversary hearing petitioner never exercised it, nor did he ever challenge the obscenity of any of the films.

each magazine to form a sufficient basis to determine whether or not there was cause to believe that a magazine was probably obscene, especially when petitioner had the right to fully contest this finding in an adversary context immediately, or as soon as practicable, after their seizure.

The third charge of Obscenity in the Second Degree concerned some 474 reels of eight (8) millimeter films being displayed to the public in the front counter area of the front room. Each reel of film had a picture on the box and some had a brief summary of the sexual activity depicted in the reel. When the Judge started to open the first box to look at the film, the clerk of the store told the Judge that it was not necessary to look inside because all the films were sex films and the picture on the box showed what the film was all about. Certainly the Judge, who had already seen parts of 26-27 obscene films in the store, was entitled to take the clerk at his word that the picture on the box fairly summarized the contents of the film. And the fact that these films were being promoted by the clerk entirely on the basis of their appeal to sexual interest would strengthen the Judge's conclusion that this material was obscene, and not protected by the First Amendment, *United States v. Ginzburg*, 383 U.S. 463 (1966); (*United States v. Bush*, F2d , 5th Cir. decided 10/30/78). Respondent submits that with these representations by the clerk, it can not be said as a matter of law that a Judge could not decide whether or not there was probable cause to believe the film was obscene by looking at the picture on the box.

While respondent criticizes the entire search on the grounds that the Judge did not "focus searchingly" on the issue of obscenity of a single item, because he did not view any item in its entirety; it must be emphasized that this was not a quick *ex parte* search. The Judge

spent approximately six (6) hours reviewing this material in the clerk's presence, even with the clerk's representations.

POINT III.

There was no massive seizure requiring a prior adversary hearing in the case at bar.

Petitioner's reliance in the case at bar on *Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971) to support its argument that there is an unconstitutional massive seizure of the items requiring a prior adversary hearing in order to protect the necessary sensitivity to freedom of expression is totally misplaced. As this Court stated in *Heller v. New York, supra:*

> Petitioner's reliance on the Court's decisions in *A Quantity of Books v. Kansas*, 378 US 205, 12 L Ed 2d 809, 84 S St 1723 (1964), and *Marcus v. Search Warrant*, 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *A Quantity of Books v. Kansas, supra*, at 213, 12 L Ed 2d 809. *Heller v. New York, supra*, 491.
>
> In *United States v. Thirty-seven Photographs*, 402 US 363, 28 L Ed 2d 822, 91 S Ct 1400 (1971),

and *Freedman v. Maryland,* 380 US 51, 13 L Ed 2d 649, 85 S Ct 734 (1965), we held that " 'because only a judicial determination in an adversary proceeding ensures the necessary sensitivity of freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint*' ". 402 US, at 367, 28 L Ed 2d 822, quoting 380 US, at 58, 13 L Ed 2d 649 (emphasis added). Those cases involved, respectively, seizure of imported materials by federal customs agents and state administrative licensing of motion pictures, both civil procedures directed at absolute suppression of the materials themselves. Even in those cases, we did not require that the adversary proceeding must take place prior to *initial* seizure. Rather, it was held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." *United States v. Thirty-seven. Heller v. New York, supra,* 489.

The higher hurdle of reasonableness referred to by this Court in *Roaden v. Kentucky, supra,* decided the same days as *Heller v. New York, supra,* was that a neutral and detached magistrate, not a member of law enforcement must make this initial determination of probable cause to seize. In *Roaden* a sheriff arrested the defendant immediately after viewing the film by himself, and seized the full length film being exhibited to the public at a drive-in theater incident to that arrest.

> This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. (cites omitted) *Heller v. New York, supra,* 488.

In the case at bar, every item seized was initially screened by the Judge and only taken as evidence. The police only took what the Judge directed them to seize.

An evil of the massive seizures condemned in *Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas, supra;* and *Thirty-seven Photographs v. United States, supra,* is that the seizure itself can have a chilling effect by becoming a form of prior restraint and censorship. Therefore, when the owner of the material is given a prompt, adversary hearing on the issue of obscenity, *vel non,* after the seizure, seizures involving numerous items (see *United States v. Thirty-seven Photographs, supra,* 373) or even every copy of an item, *Kingsley Books v. Brown,* 354 U.S. 436 (1957), have been constitutionally permitted.

In the case at bar, petitioner was afforded the opportunity to have an adversary hearing on the issue of the obscenity of any item immediately or as soon as practicable. Such promptness meets any constitutional limitations, *Heller v. New York, supra; Kingsley Books v. Brown, supra; Thirty-seven Photographs v. United States, supra.*

> Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant. *Heller v. New York, supra,* 490.

Thus, the fact that petitioner chose not to avail himself of the right to promptly determine the issue of obscenity, or for that matter even to contest obscenity at all, is not to be held against the respondent. In the case at bar, petitioner decided to proceed by challenging the search

and seizure by notice of motion, rather than to immediately ask that items be returned on the grounds of First Amendment protection. Petitioner consented to the holding of the hearing on August 20, 1976, and to February 3, 1977, as to the date upon which to plead guilty. As a matter of fact, on at least one occasion the plea date was adjourned at petitioner's request. At all times the State of New York was ready to proceed as expeditiously as petitioner desired. What the Court said in *Heller v. New York, supra,* 490, applies to the case at bar:

> Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired.

Petitioner claims that the following facts show that the state was attempting to suppress distribution of the items, not to seize them temporarily as evidence: One, that the movie machines were seized; two, that the police stood at the door and took names; and three, that a large number of items were seized; and four, that there were more than one copy of an item taken.

Petitioner cites, *Dexter v. Butler,* 559 F. 2d 1286 (5th Cir. 1977), *Ellwest Stereo Theater, Inc. v. Byrd,* 404 F. Supp. 33, 51 (S.D. Tex., 1975) and *Bongiovanni v. Hogan,* 309 F. Supp. 1364 (S.D. NY, 1970) in support of his position that the seizing of the movie machine shows that the State was trying to finally suppress the material comprising the count of Obscenity in the Second Degree charging him with promoting 26 obscene films in the machines. However, *Dexter v. Butler, supra,* and *Ellwest Stereo Theater v. Byrd, supra,* involve the situation in which the police repeatedly seized the machine with the

films, and never instituted criminal proceedings. In *Dexter,* the police seized the four (4) copies of film and four (4) projectors on four (4) different occasions over a two (2) week period. Furthermore, the state had not charged the owner of the films with any violation even after 339 days. In *Ellwest Stereo Theater,* the police seized three (3) films in three (3) machines on one (1) day and then two (2) films in two (2) machines on another day. The state never prosecuted *Ellwest Stereo Theater* based on the seizure. The courts held that the repeated seizure, without ever initiating charges amounted to bad faith and an attempt to censor the films. In *Bongiovanni* the police seized a full-length film and lenses, and still photos which the Judge viewed at a theater. Relying on *Bethview Amusement Corp. v. Cahn,* 416 F. 2d 410 (2d Cir., 1969), which has been overruled by *Heller v. New York, supra,* the Court ruled that the film and photos must be returned because there was no prior adversary hearing on the issue of obscenity. It also ruled that the lenses should be returned because the minimal evidentiary value of the lenses was outweighed by the restriction to freedom of expression.

Under New York law, the state must prove, in addition to the fact that the item is obscene, that the petitioner promoted it or processed it with intent to promote it, New York Penal Law Section 235.05, Subdivision 1. The term "promote" is defined in New York Penal Law Section 235.00 Subdivision 4. Respondent submits that the machines are direct evidence of promoting under the law. They prove how petitioner was exhibiting the item. Thus, the state could seize them as evidence of promotion.

Clearly the facts that there has not been another seizure since 1976, that the store was continuously open, that petitioner was immediately issued an appearance ticket to answer charges concerning the seizure, and

search warrant shown to the clerk prior to the search put him on notice of his right to an immediate adversary hearing, show that respondent did not seize these items in bad faith to harass petitioner or finally restrain distribution, but rather seized them as evidence and attempted to minimize any chilling effect that the seizure of this evidence would have. However, even if the machines were improperly taken; the remedy would be to return them; not to suppress the entire seizure, *Bongiovanni v. Hogan, supra; United States v. Sherwin, supra.*

Petitioner citing *Maguin v. Miller,* 432 F. Supp. 223 (D. Kan., 1977); and *P.A.B., Inc. v. Stack,* 440 F. Supp. 937 (S. D. Fla., 1977) argues that by stationing police on the doors to take names, respondent was attempting to restrain distribution of ideas by harassing customers. However, *Maguin* and *P.A.B., Inc.* are totally distinguishable from the case at bar. In *Maguin,* the police conducted seven (7) seizures at the Circle Theater and on each occasion took the names of all people in the theater at the time. On three (3) occasions patrons had to state their names aloud. In *P.A.B., Inc.* the police continuously, between 37 and 100 times, stopped people entering and exiting the store and checked identification, took auto license numbers and stationed police or police cars in front of the store. Clearly, the Court in those cases had reason to find that the police were in bad faith harassing people in order to try to close the store.

In the case at bar, on only one occasion, on June 25, 1976, the time of the search and seizure, was an officer at the door to take names of those who entered, because these people were potential witnesses at a suppression hearing. Since that search, the police have not bothered the store. Contrary to petitioner's claim, both the police and petitioner's clerk knew that it was the police's intention for the store to remain open to the public throughout

the day. This is indicated by the facts that the petitioner's clerk was permitted to move freely throughout the store and at one point asked the police not to let any potential patron view the films in the machines without paying when he voluntarily automated the machine for the Judge. If the clerk had reason to feel that the police were closing the store by their actions, he never would have made that statement.

The fact that numerous different items were taken doesn't show that the items were taken in an attempt to finally restrict expression, *United States v. Thirty-seven Photographs, supra.* Each item was taken at the direction of the Judge after he reviewed it. Not every item in the store was taken. The Judge didn't direct that every item he viewed be taken. Items which he didn't view were left. As a matter of fact, the store was open for business the very next day. Petitioner never showed any final restraint as to any item seized.

The fact that under the first and second counts of the information more than one copy of some of the items were seized also doesn't show any intent, per se, to finally retain expression, *Kingsley Books v. Brown, supra; Art Theater Guild, Inc., v. Parrish,* 503 F. 2d 133 (6th Cir., 1974); *State v. Taylor,* 143 N. J. Super. 119 (Sup. Ct., App. Div., 1976). Under New York law the people must prove "promoting" the item in addition to its obscenity. The fact that a party has more than one copy of the item is clearly relevant on this issue. In fact New York Penal Law Section 235.10, Subdivision 2, creates a presumption that one intends to promote an article by processing six (6) or more identical or similar copies of the obscene articles.

The taking of more than one (1) copy of an item for a valid evidentiary purpose is permitted, *Art Theater Guild, Inc. v. Parrish, supra; State v. Taylor, supra.* As long as petitioner is given a prompt adversay hearing on this issue of obscenity, *vel non,* it makes no difference if one (1), two (2), ten (10) or more copies of the item are taken, *Kingsley Books v. Brown, supra.* However, even if taking more than one copy was improper, then proper remedy is to return the extra copies; not vitiate the counts tainted with duplicitous copies, *United States v. Sherwin, supra.*

If the intent was to finally restrain expression, why would the State have offered an immediate adversary hearing to contest obscenity and an opportunity to immediately reacquire the item? The mere posing of this question shows that everything seized in the case at bar was seized temporarily as evidence.

The language and holding of *Heller v. New York, supra,* is very appropriate:

> In the case, of course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with distruction. *Heller v. New York, supra,* 490.
>
> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented containing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue

> in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. *Heller v. New York, supra,* 492.
>
> With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll v. Princess Anne, supra,* at 183-184, 21 L Ed 2d 325. The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses. Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film. *Heller v. New York, supra,* 493.

Conclusion.

In the case at bar, there was no search or viewing of any item for which petitioner had a legitimate expectation of privacy under the Fourth Amendment. Every item viewed was being displayed to the general public in areas open to the public, and was viewed by the Judge during business hours when the store was open to the public. Under our Constitution, any Judge or police officer may initially view items displayed to the public in public areas without a warrant or probable cause or with a general warrant.

In the case at bar, every item seized was initially viewed by the Judge prior to its seizure, and the item (and its copies) was only seized after the Judge was satisfied that there was probable cause to believe the item was obsecene. Throughout the day the Judge acted in a neutral and detached manner. He decided for himself what he would view and what should, or should not, be seized. While the Judge may not have viewed any item in its entirety, it cannot be said as a matter of law, that his initial review was insufficient. Especially since petitioner had the right to an immediate adversary hearing on the issue of obscenity, *vel non*. Given the fact that the items seized were short eight (8) millimeter films and predominantly picture magazines being offered for sale in a store claiming to promote sexually explicit material, the Judges review, taking six (6) hours was sufficient.

Throughout the day the State acted in good faith. Before starting the search the State obtained a warrant and showed it to petitioner thereby putting him on notice of his right to an immediate adversary hearing. The police sent enough men into the store so that they could minimize the amount of time it would take to gather the numerous items for the Judge to review and to transport the items the Judge directed to be seized. The police took names of people entering the store only to have a list of potential witnesses at a hearing. Since June 25, 1976, the police have made no attempt to interfere with petitioner's business.

Every item was seized as evidence to show that either the item iself was obscene or that petitioner was promoting it, or both. Every item was seized temporarily and petitioner had the right to an immediate adversary hearing to contest that the item was not obscene and therefore, have it returned.

THEREFORE, under the Constitution of the United States and the cases decided therein, each of petitioner's three separate judgments of conviction should be upheld.

Respectfully submitted,

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February, 1979.

Appendix.

NEW YORK STATE PENAL LAW §235.10 (2)

§235.10 (2) Obscenity; presumptions

A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

FEDERAL RULES OF CRIMINAL PROCEDURE Rule 41 (c) (2)

Rule 41 (c) (2)
Warrant upon oral testimony—

(A) General Rule—If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application—The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance—If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony—When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents—The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution—The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded—Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.